CIMB INVESTMENT BANK BHD

v.

ERNST & YOUNG & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
ANANTHAM KASINATHER JCA
ZAKARIA SAM JCA
[CIVIL APPEALS NO: W-02(IM)(NCC)-1750-08-2013
& W-02(IM)(NCC)-1690-07-2013]
12 FEBRUARY 2014

CIVIL PROCEDURE: *Summary application - Rules of the High Court 1980, O. 14A - Auditors - Whether auditors owe duty of care to company's clients when carrying out statutory audits*

COMPANY LAW: *Auditors - Duties of auditors - Whether auditors owe duty of care to company's clients when carrying out statutory audits - Test for determining duty of care*

TORT: *Negligence - Professional negligence - Auditors for licensed fund manager company - Failure to detect fraud in company's management of clients' funds - Company wound up with losses to company's investors - Whether auditors owed duty of care to investors - Test for determining duty of care - Whether negligence established*

SJ Asset Management Sdn Bhd ('SJAM') was a licensed fund manager under the Securities Industry Act 1983 ('SIA') and the Capital Markets and Services Act 2007 ('CMSA'). The appellants in Civil Appeal No. W-02-(IM)(NCVC)-1690-07-2013 ('Appeal 1690') were clients of SJAM. The appellant in Civil Appeal No. W-02-(IM)(NCVC)-1750-08-2013 ('Appeal 1750') had caused its clients to invest in SJAM pursuant to an Investment Management Agreement. The *locus* of this appellant to commence this action was derived from having settled its client losses arising from their investments in SJAM. SJAM had engaged the respondent to perform statutory audits under the Companies Act 1965 ('CA') for the financial years ended 31 December 2002 to 31 December 2009; and the SIA for the financial years ended 31 December 2004 to 31 December 2006. The respondent produced audit reports. Following complaints against SJAM, the securities commission ('SC') revoked SJAM's capital market services license under the CMSA on 23 July 2010. Subsequently SJAM was wound up by the court. The appellants' accountants investigated

A the accounts of SJAM and found fraud in SJAM's management of the clients' funds. Hence, the appellants commenced this action against the respondent based on negligence. The respondent applied under O. 14A / O. 33 of the Rules of Court 2012 for the determination of the issue of whether the respondent owed a duty
B of care to the appellants when carrying out the statutory audits to be tried as preliminary issues. The Judicial Commissioner ('JC') determined the preliminary issues in favour of the respondent thereby dismissing the appellants' claims. The basis for the JC's ruling of the absence of duty of care under the common law were:
C (i) the appellants were not the original and intended recipients of the audit reports; (b) the purpose of the reports was not for making investment decisions; and (c) there were disclaimers as to the purpose for which the audit reports were made, which excluded third parties such as the appellants. The basis for the
D JC's ruling of the absence of any statutory duty of care were: (a) based on the SC checklist for fund managers, and Forms 9 and 10 of the SIA, the SIA audits were 'compliance' and not 'investigative' audits, in that the emphasis was on ensuring the segregation of SJAM's accounts from SJAM's clients' accounts;
E and (b) while the SIA set out duties of fund managers in relation to its investors' trust accounts, such statutory duties were to be enforced by the SC, and not by the investors themselves through private rights of action. The appellants appealed against this decision.

F

Held (allowing appeals with costs)
Per Anantham Kasinather JCA delivering the judgment of the court:

G **(1)** The court should apply the guidelines enunciated by Lord Bingham in *Her Majesty's Commissioners of Customs and Excise v. Barclays Bank* and accepted by the Federal Court when considering the issue of duty of care. The first test is premised on the 'assumption of responsibility'. Effectively this test
H means that: (a) reliance on the respondent auditor's report is no longer an essential ingredient to establish duty of care; (b) no anterior relationship between the appellants and the respondent is necessary to satisfy ingredients of foreseeability and proximity; and (c) the ingredient relating to proximity is
I satisfied so long as the assumption of responsibility may be inferred by reason of the existence of a special relationship. (paras 44 & 46)

(2) The respondent would know or ought to know that the appellants were vulnerable because they were unable to protect themselves from the consequences of the respondent's want of care and the respondent's want of and failure to exercise care would be inherently likely to cause that type of economic loss. The respondent as auditors should have foreseen economic loss to the appellants in these circumstances. (paras 49 & 50)

(3) It was part of the duty of the respondent under s. 50 of the SIA to immediately make a report to the SC if it became aware: (a) of any matter which in its opinion may constitute a breach of any provision of the securities laws; (b) of any irregularity that may have a material effect upon the fund manager's account, including any irregularity that may jeopardise its clients' assets; (c) that losses had been incurred by the fund manager, which rendered it unable to meet the minimum statutory financial requirements; and (d) that the auditor was unable to confirm that the claims of the fund manager's clients were covered by the fund manager's assets. (para 54)

(4) By applying the threefold tests pronounced in *Caparo Industries Plc v. Dickman* to the total exclusion of the other two tests which were ruled to be equally applicable in this country by the Federal Court in *Co-operative Central Bank v. KGV*, the JC applied the wrong test to the novel situation prevailing on the particular facts of this case. The facts in this case being novel, because of the unusual situation in which the appellants found themselves to be in, whereby their funds and investments were in the hands of a trustee fund manager (SJAM) but over which funds they had no control. The respondent's agreement to conduct the SIA audit for SJAM with knowledge or imputed knowledge of the unusual situation in which the appellants were placed, gave rise to a duty on the part of the respondent to undertake a proper audit in the course of carrying out its statutory duty and this obligation created such a relationship between it and the appellants so as to give rise to a common law duty of care. (para 59)

(5) If the respondent had not breached their duty of care, the audit reports would have been qualified and the irregularity in the accounts of SJAM would have been reported to the SC.

A Such a report to the SC, in turn, would have caused the SC to take the appropriate action thereby causing SJAM to cease trading and consequently diminish the losses of the appellants. However, because the audit reports that were produced by the respondent were 'clean', the SC took action much later
B and the ensuing winding up of SJAM was delayed thereby causing substantially more losses to the appellants. (para 60)

Bahasa Malaysia *Translation Of Headnotes*

C SJ Asset Management Sdn Bhd ('SJAM') adalah pengurus dana berlesen di bawah Akta Perindustrian Sekuriti 1983 ('APS') dan Akta Pasaran Modal dan Perkhidmatan 2007. Perayu-perayu dalam Rayuan Sivil No. W-02-(IM)(NCVC)-1690-07-2013 ('Rayuan 1690') adalah pelanggan-pelanggan SJAM. Perayu dalam Rayuan
D Sivil No. W-02-(IM)(NCVC)-1750-08-2013 ('rayuan') telah menyebabkan pelanggan-pelanggannya melabur dalam SJAM berikutan perjanjian pengurusan pelaburan. *Locus* perayu untuk memulakan tindakan ini adalah kerana telah menyelesaikan kerugian pelanggan akibat pelaburan-pelaburan mereka dalam SJAM. SJAM
E telah menggunakan khidmat responden untuk menjalankan audit statutori di bawah Akta Syarikat 1965 ('AS') bagi tahun kewangan berakhir daripada 31 Disember 2002 hingga 31 Disember 2009; dan APS bagi tahun kewangan berakhir daripada 31 Disember 2004 hingga 31 Disember 2006. Responden mengemukakan
F laporan audit. Berikutan aduan-aduan terhadap SJAM, Suruhanjaya Sekuriti ('SS') menarik balik lesen perkhidmatan modal pasaran SJAM di bawah APMP pada 23 Julai 2010. Selepas itu, SJAM digulung oleh mahkamah. Akauntan-akauntan perayu-perayu menyiasat akaun SJAM dan mendapati penipuan dalam pengurusan
G dana pelanggan-pelanggan SJAM. Dengan itu perayu-perayu memulakan tindakan ini terhadap responden berasaskan kecuaian. Responden memohon di bawah A. 14A / A. 33 Kaedah-Kaedah Mahkamah 2012 bagi pemutusan isu sama ada responden mempunyai kewajipan berhati-hati dalam menjalankan audit
H statutori yang perlu dibicarakan sebagai isu-isu awalan. Pesuruhjaya Kehakiman ('PK') memutuskan isu-isu awalan berpihak kepada responden dan dengan itu menolak tuntutan-tuntutan perayu-perayu. Asas bagi PK memutuskan ketiadaan kewajipan berhati-hati di bawah common law adalah: (i) perayu-perayu bukanlah penerima
I asal atau yang dimaksudkan oleh laporan audit; (ii) tujuan laporan bukan untuk membuat keputusan pelaburan; dan (iii) terdapat

penafian terhadap tujuan laporan-laporan audit dibuat, yang tidak memasukkan pihak ketiga sebagai perayu-perayu. Asas bagi keputusan ketiadaan kewajipan statutori berhati-hati adalah (i) berasaskan senarai semak SS bagi pengurus dana dan Borang 9 dan 10 APS, audit-audit APS adalah 'pematuhan' dan bukan 'penyiasatan', dalam mana penekanan adalah untuk memastikan pemisahan akaun-akaun SJAM dengan akaun-akaun pelanggan-pelanggan SJAM; dan (ii) walaupun APS telah menggariskan kewajipan pengurus-pengurus dana berkenaan akaun amanah pelabur-pelabur, kewajipan statutori sedemikian hendaklah dilaksanakan oleh SS dan bukan pelabur-pelabur sendiri melalui hak-hak persendirian tindakan. Perayu-perayu merayu terhadap keputusan ini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Anantham Kasinather HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah seharusnya mengguna pakai prinsip-prinsip yang dinyatakan oleh Lord Bingham dalam kes *Her Majesty's Commissioners of Customs and Excise v. Barclays Bank* dan diterima oleh Mahkamah Persekutuan Malaysia dalam mempertimbangkan isu kewajipan berhati-hati. Ujian pertama adalah berasaskan pada 'andaian tanggungjawab'. Secara efektifnya, ujian ini bermaksud: (i) pergantungan pada laporan auditor responden tidak lagi menjadi inti pati penting untuk membuktikan kewajipan berhati-hati; (ii) tiada hubungan anterior antara perayu-perayu dan responden menjadi penting untuk memenuhi inti pati kebolehjangkaan dan kedekatan; dan (ii) inti pati berkenaan kedekatan dipenuhi selagi anggapan tanggungjawab boleh disimpulkan melalui sebab kewujudan hubungan khas.

(2) Responden akan tahu atau sewajarnya tahu bahawa perayu-perayu lemah kerana mereka tidak boleh melindungi diri mereka akibat kegagalan untuk berhati-hati dan kegagalan responden untuk mengambil langkah berjaga-jaga sememangnya akan menyebabkan kerugian ekonomi sedemikian. Responden sebagai auditor-auditor sepatutnya menjangka kerugian ekonomi perayu-perayu dalam hal keadaan ini.

(3) Adalah sebahagian daripada kewajipan responden di bawah s. 50 APS untuk membuat laporan kepada SS dengan serta merta jika ia menyedari (i) sebarang hal perkara yang pada pendapatnya akan terjumlah kepada pelanggaran sebarang

peruntukan undang-undang sekuriti; (ii) bahawa sebarang ketidakaturan akan mempunyai kesan material ke atas dana pengurus akaun, termasuk sebarang ketidakaturan yang akan menjejaskan aset-aset pelanggan; (iii) bahawa kerugian tersebut akan ditanggung oleh pengurus dana, yang menjadikannya tidak boleh mencapai keperluan minimum kewangan statutori; dan (iv) bahawa auditor tidak dapat mengesahkan bahawa tuntutan-tuntutan dana pengurus-pengurus pelanggan dilindungi oleh aset-aset pengurus dana.

(4) Dengan mengguna pakai ujian tiga peringkat yang dinyatakan dalam *Caparo Industries Plc v. Dickman* dengan mengecualikan dua ujian lain yang diputuskan turut diguna pakai di Malaysia oleh Mahkamah Rayuan dalam *KGV & Associates Sdn Bhd v. The Co-operative Central Bank Ltd*, PK mengguna pakai ujian yang salah kepada situasi baru yang wujud dalam fakta-fakta kes ini. Oleh sebab fakta-fakta kes ini adalah baru, disebabkan keadaan yang lain daripada yang lain yang dalam mana perayu-perayu mendapati mereka berada, iaitu dana-dana dan pelaburan-pelaburan adalah dalam genggaman pemegang amanah pengurus dana (SJAM) yang atas mana mereka tidak mempunyai kawalan. Persetujuan responden untuk menjalankan audit APS bagi SJAM dengan pengetahuan atau perkaitan pengetahuan dengan situasi lain daripada yang lain dalam mana perayu berada, membangkitkan kewajipan di pihak responden untuk menjalankan audit yang betul dalam penjalanan kewajipan statutori dan kewajipan ini membentuk satu hubungan antaranya dengan perayu-perayu bagi membangkitkan kewajipan berhati-hati common law.

(5) Sekiranya responden tidak melanggar kewajipan berhati-hati mereka, laporan audit mungkin menjadi layak dan ketidakaturan dalam akaun SJAM mungkin akan dilaporkan kepada SS. Laporan sedemikian kepada SS, seterusnya, akan menyebabkan SS mengambil tindakan yang sepatutnya lantas menyebabkan SJAM berhenti berdagang dan kemudian mengurangkan kerugian perayu-perayu. Walau bagaimanapun, oleh kerana laporan audit yang dikemukakan oleh responden adalah 'bersih', SS mengambil tindakan terkemudian dan penggulungan SJAM berikutnya telah ditangguhkan menyebabkan kerugian besar kepada perayu-perayu.

Case(s) referred to:

Caparo Industries Plc v. Dickman [1990] 2 AC 605 ***(refd)***
Esanda Finance Corporation v. Peat Marwick Hungerfords [1997] 188 CLR 241 ***(dist)***
Hedley Byrne & Co v. Heller [1964] AC 465 ***(refd)***
Her Majesty's Commissioners of Customs and Excise v. Barclays Bank [2007] 1 AC 181 ***(foll)***
Hill v. Van Erp [1997] 142 ALR 687 ***(refd)***
KGV & Associates Sdn Bhd v. The Co-operative Central Bank Ltd [2006] 4 CLJ 241 CA ***(refd)***
Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***
Perre v. Apand Pty Ltd [1999] 164 ALR 606 ***(refd)***
Smith v. Eric Bush [1990] 1 AC 831 ***(refd)***
Spring v. Guardian Assurance [1995] 2 AC 296 ***(refd)***
Stone & Rolls Ltd (in liquidation) v. Moore Stephens [2009] 2 BCLC 563 ***(refd)***
The Co-operative Central Bank Ltd v. KGV & Associates Sdn Bhd [2008] 2 CLJ 545 FC ***(foll)***
West Wiltshire District Council v. Garland [1995] Ch 297 ***(refd)***
White v. Jones [1995] 2 AC 207 ***(refd)***
Woolcock v. CDG [2004] 205 ALR 522 ***(refd)***
X (Minors) v. Bedfordshire (1995) 2 AC 633 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 174(8A)
Rules of Court 2012, O. 14A, O. 33
Securities Industry Act 1983, ss. 40A(2), 47C, 47D, 48, 49, 50(1), (2), 53

(Civil Appeal No: W-02(IM)(NCC)-1690-07-2013)
For the appellant - Fiona Bodipalar (Thivina Kumaran with her); M/s Bodipalar Ponnudurai De Silva
For the respondent - Loh Siew Cheang (Kelvin Seet, Yap Mong Jay, Vendee Chai & Verene Tan Yeen Yi with him); M/s Cheang & Ariff

(Civil Appeal No: W-02(IM)(NCC)-1750-08-2013)
For the appellant - Rabindra S Nathan (Lukas Lim with him); M/s Shearn Delamore & Co
For the respondent - Loh Siew Cheang (Kelvin Seet, Yap Mong Jay, Vendee Chai & Verene Tan Yeen Yi with him); M/s Cheang & Ariff

[Editor's note: For the High Court judgment, please see CIMB Investment Bank Bhd v. Ernst & Young & Another Case [2014] 3 CLJ 322.]

Reported by Amutha Suppayah

JUDGMENT

Anantham Kasinather JCA:

Background Facts

[1] SJ Asset Management Sdn Bhd ("SJAM") is a licensed fund manager under the Securities Industry Act 1983 ("SIA") and the Capital Markets and Services Act 2007 ("CMSA").

[2] The appellants in Civil Appeal No: W-02-(IM)(NCVC)-1690-07-2013 were clients of SJAM. In the case of the appellant in Civil Appeal No: W-02-(IM)(NCVC)-1750-08-2013, the appellant caused its clients to invest in SJAM pursuant to an investment management agreement dated 12 April 2004. The *locus* of this appellant to commence this action is derived from having settled its client losses arising from their investments in SJAM.

[3] SJAM held, administered and managed various investments of the appellants and, in the case of the appellant in Civil Appeal No: W-02-(IM)(NCVC)-1750-08-2013, its clients, comprising of cash, securities and other assets.

[4] SJAM engaged the respondent to perform statutory audits under:

(a) the Companies Act 1965 ("CA") for the financial years ended 31 December 2002 to 31 December 2009; and

(b) the SIA for the financial years ended 31 December 2004 to 31 December 2006.

[5] It is not in dispute that in pursuance of the aforesaid engagement, the respondent produced audit reports. Following complaints against SJAM, the securities commission proceeded to investigate SJAM and revoked its capital market services license under the CMSA on 23 July 2010. On 27 July 2012, the SC filed a winding up petition against SJAM and SJAM was wound up by the court on 14 October 2010.

[6] The appellants, in turn, appointed their own accountants to investigate the accounts of SJAM and based on their accountant's findings of fraud in the management of the funds of their clients by SJAM, the appellants commenced this action against the respondent.

Background To This Appeal

[7] The thrust of the appellants' claim is based on negligence. It is common ground that an essential ingredient of a claim based on negligence is duty of care. Presumably for this reason, the respondent filed an application under O. 14A/O. 33 of the Rules of Court 2012 for the issue of whether the respondent owed a duty of care to the appellants to be tried as a preliminary issue.

[8] The learned High Court Judge allowed the respondent's application and framed the following issues for determination by the court. The issues being:

(a) whether the defendant ("E&Y"), when carrying out the statutory audits in accordance with the Companies Act 1965 ("CA") for SJ Asset Management Sdn Bhd ("SJAM") and issuing the reports dated 28 March 2003, 30 March 2004, 31 March 2005, 24 March 2006, 29 March 2007, 27 March 2008, 31 March 2009 and 19 April 2010 ('CA Audit Reports') owed a duty of care to:

(i) The plaintiff (CIMB), an investment adviser allegedly acting on behalf of its clients, which allegedly relied on the CA Audit Reports to make, advise or facilitate investments for or on behalf of its clients, and not on its own behalf; and

(ii) Any client or investor of SJAM (including CIMB's clients), whether known and existing or unknown and potential's as an indeterminate class of persons who allegedly relied on the CA Audit Reports to make investment decisions,

and

(b) whether E&Y, when carrying out the audits in accordance with the Securities Industry Act 1983 ('SIA') for SJAM and issuing the reports dated 30 March 2004, 31 March 2005, 24 March 2006 and 29 March 2007 (SIA Audit Reports), owed a duty of care to:

(i) CIMB, an investment adviser allegedly acting on behalf of its clients, which allegedly relied on the SIA Audit Reports to make, advise or facilitate investments for or on behalf of its clients, and not on its own behalf; and

(ii) any client or investor of SJAM (including CIMB's clients), whether known and existing or unknown and potential, as an indeterminate class of persons who allegedly relied on the SIA Audit Reports to make investment decisions.

[9] The learned Judicial Commissioner ('LJC') determined the preliminary issues in favour of the respondent thereby resulting in the claims of the appellants in Civil Appeal No: W-02-(IM)(NCVC)-1690-07-2013 and the appellant in the Civil Appeal No: W-02-(IM)(NCVC)-1750-08-2013 being dismissed.

[10] Since the two appeals revolve around identical issues, we heard the two appeals together and this judgment represents our decision on the two appeals.

Judgment Of High Court

[11] Her Ladyship opined that under the common law, the case of *Caparo Industries Plc v. Dickman* [1990] 2 AC 605 ('*Caparo*') held that three elements are required to establish a duty of care for claims for pure economic loss, these being:

(a) foreseeability;

(b) a close and direct relationship of 'proximity' between the parties; and

(c) it is fair and reasonable to impose liability.

[12] Based on the pronouncements of Lord Bridge of Harwich in this case, Her Ladyship opined that all three requirements had to be satisfied before a duty of care can be said to exist in favour of the appellants under the common law. Applying the pronouncements of Lord Bridge to the facts of this case, Her Ladyship pronounced that:

> even if E&Y could have foreseen that their audit reports will be relied by any third parties, including the Plaintiff investors and CIMB, it is not the determining factor to ascertain a duty of care

[13] Her Ladyship then proceeded to consider whether the appellants had satisfied the requirement of 'proximity' based on the following facts:

(a) that the appellants are not the original and intended recipients of the audit reports, but SJAM and its shareholders in the general meeting;

(b) that there are disclaimers as to the purpose for which the audit reports were made and who may rely on the same; and

(c) the purpose of the reports was not for making investment decisions.

[14] Since it was not in dispute that the respondent had only provided the annual audit reports to members of SJAM, Her Ladyship ruled that the appellant had failed to establish the ingredient of 'proximity', a prerequisite to establishing duty of care under the common law in the following terms:

> In the premise, I am of the considered opinion that CIMB and the investors are not the original and intended recipients of the audit reports, but SJAM and it shareholders in the general meeting; whereas the SIA reports are only meant for the SC.
>
> In the premise, I am of the considered opinion that because CIMB and the investors are not the original and intended recipients of the audits reports, the disclaimers and that the purpose of the reports was not for making investment decisions, I find that there is no close and direct relationship of 'proximity' between E&Y and CIMB and the investors.

[15] Her Ladyship then proceeded to consider the existence of duty of care by reason of statutory provisions contained in the SIA and the CMSA. In this respect, Her Ladyship observed that:

> With regards to the CA audits, I agree with learned counsel for E&Y that the purpose of such audits is to inform members of the company of the transactions and financial position of the company. This is an internal financial matter on the assets and liabilities of the company and does not deal with assets that do not belong to the company. As such, it is for a limited purpose and thus no duty arises to a third party.

[16] Based on Her Ladyship's observation that the audit reports were meant for the information of the members of SJAM only, Her Ladyship ruled the audit reports to be really "compliance audits". Her Ladyship's reasoning for this ruling being:

> Having considered the submissions of parties, I am of the considered opinion that the SIA Audit Reports are merely compliance audit and not an investigative audit. This is evidenced from the requirements specified by the SC in "Lampiran A", the Checklist for Fund Managers. "Lampiran A' includes the ascertainment of whether the clients money are separately maintained, whether it is used to pay the fund managers' liability and whether the clients' monies are deposited in the trust accounts not later than the next day. There is also a checklist on the clients' investments, such as the nature of investment and whether the clients' investment are executed in accordance with the client's mandates.

[17] Her Ladyship acknowledged that the auditors should have foreseen the possibility of the appellants relying on their reports. However, Her Ladyship ruled that this fact alone is insufficient to establish duty of care since:

> Even though 'foreseeability' is a necessary threshold requirement, it is insufficient by itself to find a duty of care. Even if E&Y could have foreseen that their audit reports will be relied by any third parties, including the Plaintiff investors and CIMB; it is not the determining factor to ascertain a duty of care. In *Loh Chiak Eong & Anor v. Lok Kok Beng & Ors* [2013] 1 MLJ 27, the Court of Appeal held at page 41:
>
> > We are, however, prepared to accept the Plaintiff's contention that the defendants, as the architects of the project, would be able to foresee that the various acts or omissions complained of, assuming for the moment that the allegations to some extent are true, would result in a delay in obtaining the CFOs and consequential financial loss to the Plaintiffs. But 'foreseeability of harm or damage' is not the only test or factor in determining the existence of a duty of care. In other words, as a matter of law, foreseeability of injury or damage does not automatically lead to a duty of care (see *Simaan Contracting Co v. Pilkington Glass Ltd (No. 2)* [1988] QB 758; and *Man B & W Diesel*). As a matter of law, there are other considerations to be taken into account as well. (paragraph 18 of the judgment)

[18] Her Ladyship in coming to the conclusion that the appellants had failed to establish duty of care was very much influenced by the disclaimer clauses in their appointment letter with SJAM. This is evident from the following passages in Her Ladyship's judgment:

> Our report is solely for use in connection with your submission of the Appendix B to the Securities Commission as required under section 49 of the Securities Industry Act 1983 and the Securities Industry Regulations 1996 (paragraph 22 of the judgment)

> In the premise, I am of the considered opinion that CIMB and the investors are not the original and intended recipients of the audit reports, but SJAM and its shareholders in the general meeting; whereas the SIA reports are only meant for the SC. (paragraph 22 of the judgment)

[19] The basis for Her Ladyship's ruling of the absence of duty of care under the common law may be summarised to be the following three grounds:

(a) The appellants were not the original and intended recipients of the audit reports;

(b) the purpose of the reports was not for making investment decisions; and

(c) there were disclaimers as to the purpose for which the audit reports were made, which excluded third parties such as the appellants.

[20] The basis for Her Ladyship's ruling of the absence of any statutory duty of care may be summarised to be the following two grounds:

(a) based on the securities commission checklist for fund managers, and Form 9 and 10 of the SIA, the SIA audits were 'compliance' and not 'investigative' audits, in that the emphasis was on ensuring the segregation of SJAM's accounts from SJAM's clients' accounts; and

(b) while the SIA set out duties of fund managers in relation to its investors' trust accounts, such statutory duties were to be enforced by the securities commission, and not by the investors themselves through private rights of action: see [49] of the judgment.

Appellant's Case

[21] Learned counsel for the appellant submitted that a careful analysis of the three judgments delivered by the Federal Court in the celebrated case of *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 MLJ 389 ('MPAJ') and the review of the ratio of this case in *The Co-operative Central Bank Ltd v. KGV & Associates Sdn Bhd* [2008] 2 CLJ 545; [2008] 2 MLJ 233, will reveal the current law in Malaysia on duty of care to be that:

(a) the threefold test in *Caparo* is not the unitary or definitive test in Malaysia, in deciding whether a duty of care of care is owed by one party to another in the context of pure economic loss;

(b) the key to determining whether a duty of care is owed, particularly in the case of auditors depends very much on the particular facts of the case; and

(c) in considering all the relevant facts and circumstances of a given case, our courts are to be guided by such tests that are developed by the courts in the various Commonwealth jurisdictions, as it sees fit, including the threefold or the 'assumption of responsibility' test.

[22] With reference to the assumption of responsibility test, adopted in *Hedley Byrne & Co v. Heller* [1964] AC 465, and applied in subsequent House of Lord's cases including *Smith v. Eric Bush* [1990] 1 AC 831, *White v. Jones* [1995] 2 AC 207, and *Spring v. Guardian Assurance* [1995] 2 AC 296, learned counsel for the appellant submitted that this is an objective test, with the relevant question being whether the defendant, by his words or conduct, should be held by the law to have assumed responsibility for the claimant. In *White v. Jones* (*supra*), according to the learned counsel, Lord Browne-Wilkinson acknowledged 'assumption of responsibility' in the law of negligence to extend to cases of 'special relationships' between the parties. The premise being that in cases where a special relationship exist, the defendant is assumed to have a duty to be careful in circumstances where, apart from such relationship, no duty of care would exist. An instance of special relationship recognised by Lord Browne-Wilkinson was where there existed a fiduciary relationship between the parties although His Lordship acknowledged that a fiduciary relationship is not the only such relationship but other relationships may also be held to give rise to the same duty.

[23] Another aspect of the decision of Lord Browne-Wilkinson in the case of *White v. Jones* (*supra*) upon which much reliance was placed by learned counsel for the appellant was the pronouncements of His Lordship that reliance is not a necessary feature in finding the existence of a duty of care. This pronouncement relating to the existence of a duty of care notwithstanding the absence of any reliance on the part of the claimant, according to learned counsel also enjoys the support of numerous authorities originating from Australia. Brennan CJ in the Australian High Court decision of *Hill v. Van Erp* [1997] 142 ALR 687 opined, on the facts of that case, that although the solicitor had not consciously assumed a responsibility over the respondent, and that the respondent had not relied on the actions of the solicitor, this was not in his opinion a bar to recovery in damages for pure economic loss.

[24] It is the submission of learned counsel for the appellant that the lack of the need for any reliance in order to found a duty of care is synonymous with the position adopted by the Australian courts under the concept of 'vulnerability'. Under this concept, according to the learned counsel for the appellant, the Australian courts have opined that a duty of care can arise in circumstances where a defendant was aware that the plaintiff was likely to suffer economic loss as a consequence of the defendant's negligence. In the case *Perre v. Apand Pty Ltd* [1999] 164 ALR 606 a case cited by Steve Shim CJ (Borneo) (as he then was) in *MPAJ* (*supra*), McHugh J observed that what is likely to be decisive, and always relevant, in determining whether a duty of care is owed is the answer to the question, "How vulnerable was the Plaintiff to incurring loss by reason of the defendant's conduct?". McHugh J stressed that in determining whether a duty of care was established in pure economic loss cases, there would normally be no reason to impose a duty on a defendant where it was reasonably open to the plaintiff to take steps to protect itself. The rationale being that the more able a plaintiff is able to protect itself, the less vulnerable it is. In this regard, His Lordship observed that the degree and the nature of vulnerability sufficient to found a duty of care will vary from category to category and from case to case:

(a) Although each category will have to formulate a particular standard, the ultimate question will be one of fact;

(b) The defendant's control of the plaintiff's right, interest or expectation will be an important test for vulnerability.

[25] It is the submission of learned counsel for the appellant that five years later, in *Woolcock v. CDG* [2004] 205 ALR 522, the High Court of Australia further refined the pronouncements of Mr McHugh J in *Perre v. Apand Pty Ltd* (*supra*) by pronouncing the following further guiding principles on the concept of 'vulnerability':

(a) Vulnerability was not simply a reference to the damage that a plaintiff would suffer if reasonable care was not taken;

(b) Instead, it was to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of care.

[26] Reverting to the current status of the law of this country on duty of care in cases of economic loss, learned counsel for the appellant submitted that this court is not bound by any decision of the Federal Court to adhere strictly to the threefold test in *Caparo* when deciding whether or not a duty of care arises on the facts of this case. Learned counsel for the appellant submitted that it is not the *ratio* of the decision of the Federal Court in the *MPAJ* (*supra*) that our courts are bound to slavishly follow the threefold test. On the contrary, the Federal Court in this decision, according to counsel, approved a more open approach thereby allowing our courts to apply the threefold test subject to the divergent approaches adopted by the various courts in the Commonwealth to the question to how to determine a duty of care in cases relating to economic loss.

[27] Learned counsel for the appellant then submitted that the assumption of responsibility test and the concepts of 'vulnerability' and 'control' are mutually reinforcing in nature in that:

(a) if the appellant is placed in a position of vulnerability, which the respondent is or should be aware of, and still proceeds to carry out the acts on which the appellant relies, it can be argued that the respondent assumes a responsibility over the appellant;

(b) the respondent in such a situation is usually in a position of control *vis-à-vis* the appellant, wherein it can affect the appellant's situation, while the appellant is helpless to intervene; and

(c) the respondent therefore owes a duty of care to the appellant in relation to the acts that are carried out.

[28] Applying the facts of this case to the assumption of responsibility test highlighted in paras. 22 and 23 above and the vulnerability and control elements of this test, learned counsel for the appellant submitted that the respondent had undertaken a position of control *vis-à-vis* the investments of the SJAM clients as SJAM's auditor, such that the respondent was aware that the appellants would suffer economic loss if it negligently carried out its audit duties. On the facts, there was therefore a 'special relationship' between the respondent and SJAM, which is sufficient to found a duty of care under the 'assumption of responsibility' test.

[29] The alternative submission of the learned counsel for the appellant was that the learned judge of the High Court ought to have ruled in favour of the existence of a duty of care even upon the application of the threefold tests in *Caparo*. Counsel's submission to this effect was posited on the fact that the appellants had placed their investment assets on trust with SJAM and were consequently in the position of beneficiaries *vis-à-vis* SJAM. The trust and fiduciary obligations that SJAM as fund manager assumed towards them being the difference with the shareholders in *Caparo*. In many cases, according to learned counsel for the appellant, the legislative framework in question has permitted the courts in different jurisdictions to see a wider purpose, and to extend a statutory duty of care by auditors to third parties. In view of the foregoing, learned counsel submitted that the High Court took an unduly narrow view in stating that the sole purpose of the SIA audit is 'to inform members of the company of the transactions and financial position of the company' as stated at para. 41 of the judgment. Instead, learned counsel submitted that the High Court should have recognised that as the auditor of a company that held funds and investments on trust for vulnerable beneficiaries such as the appellants', the duties owed by the respondent were wider than that imposed under a strict analysis of the Companies Act 1965 framework alone, such that it also extended to the appellants.

[30] The third alternative submission of learned counsel for the appellant in support of the appellants' claim to the existence of the duty of care was premised on the need for audits to be carried out every year of SJAM under the SIA and following the repeal of the SIA, under the CMSA. It is the submission of learned counsel for the appellant that the respondent is potentially liable to the appellant for any breach of this statutory obligation:

(a) first, by breaching a common law duty to exercise care in the carrying out of the audit under the provisions of the SIA, and subsequently, the CMSA; and

(b) alternatively, and secondly, by breaching a statutory duty of care under the SIA and the CMSA for which there is a private law cause of action.

A According to counsel the causes of action under the common law and the private law cause of action are not mutually exclusive as evidenced by the following passage in the judgment of the Court of Appeal in the case of *West Wiltshire District Council v. Garland* [1995] Ch 297 at 310 that:

B

> because a Plaintiff has an action for breach of statutory duty in respect of the negligent performance of statutory duties it does not follow that he therefore cannot have an action at common law in respect of the same negligence.

C **[31]** The following pronouncements of Lord Browne-Wilkinson in *X (Minors) v. Bedfordshire* (1995) 2 AC 633 were cited to us as authority for the proposition that there are four categories of private law claims involving statutory duties, namely:

D (a) actions for breach of statutory duty *simpliciter*, irrespective of carelessness;

(b) actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action;

E (c) actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it, and

(d) misfeasance in public office, ie, failure to exercise or
F intentionally wrongful/unlawful exercise of statutory powers (at p. 730 to 735).

[32] His Lordship opined at p. 735 of the reported judgment of the court that the common law duty of care would allege that:

G (a) Either a statutory duty gives rise to a common law duty of care owed to the plaintiff by the defendant to do or refrain from doing a particular act in the course of carrying out a statutory duty, or

H (b) That in the course of carrying out a statutory duty the defendant has brought about such a relationship between himself and the plaintiff as to give rise to a common law duty of care.

I

[33] Learned counsel for the appellant submitted that the negligent performance of the statutory audit functions in respect of the SIA and CMSA audits gave rise to both a common law action and a private law claim/cause of action for breach of statutory duty. The duty of care arising in the following manner:

(a) a common law duty of care owed to the appellants by the respondent to do or refrain from doing a particular act in the course of carrying out the statutory audit duty, and

(b) that in the course of carrying out the statutory audit, the respondent had brought about such a relationship between itself and the SJAM investors as to give rise to a common law duty of care.

Respondent's Case

[34] The thrust of the submission of counsel for the respondent was that the Federal Court has consistently acknowledged that the common law duty of care in all negligence claims, including claims for pure economic loss, is the 'threefold test' laid out in *Caparo* in the absence of a statutory duty. The cases of *The Co-operative Central Bank Ltd v. KGV & Associates Sdn Bhd* [2008] 2 CLJ 545; *MPAJ* (*supra*) were cited in support of this proposition.

[35] According to counsel, the threefold test when applied to the facts of this case will reveal the absence of any forseeability for the economic loss because:

(a) There is an absolute disconnect between the contents of the reports and the 'investment decisions' in the phrased questions in that the reports contain no information about securities in the capital market that might be available for investment, including the issuers of such securities;

(b) The decision on the part of investing members of the public to invest or not to invest in particular securities depends upon the recommendations an investment adviser may make to its clients who may reasonably be expected to rely on the recommendations; and

(c) The content of the recommendations of investment advisers must have a 'reasonable basis'. Section 40A(2) of the SIA sets out three statutory ingredients defining 'reasoning basis (see para. 22 of the written submission of counsel for the respondent.

[36] Learned counsel for the respondent further submitted that over and above the absence of the ingredient of forseeability, there was no common law proximity between the parties to this action because:

(a) the statutory duty which enjoined the preparation and certification of the CA audit reports is explicit in s. 174 of the CA (report to members in general meeting): *Caparo*; Reaffirmed in *Stone & Rolls Ltd (in liquidation) v. Moore Stephens* [2009] 2 BCLC 563;

(b) the purpose the CA audit reports were not intended to serve, or had anything to do with, the 'investment decisions', the contemplated transactions of the third parties under s. 40A of the SIA;

(c) there were conditions pursuant to which the CA audit reports were prepared and given; and

(d) the matters in (a), (b) and (c) apply mutatis mutandis to the SIA audit reports (see para. 23 of the written submission of counsel for the respondent)

[37] According to the submission of learned counsel for the respondent, neither do the facts of this case justify the imposition of duty of care on the grounds that it was 'fair, just and reasonable' since this case has no special facts or extraordinary features that make it 'novel' such as to justify cautious extensions of new areas of liability by careful increments. Learned counsel conceded that unlike the facts in the *Caparo*, the respondent performed the dual functions in the form of the CA audits and the SIA audits. However, learned counsel for the respondent submitted that this is not an extraordinary fact and the LJC was correct to hold that the so-called SIA audit reports were not 'audits' into trust funds within the ordinary meaning of that term. The purpose of the SIA audit reports was to supply the SC with prescribed information whether its licensee (SJAM) had complied with part VII division 2 of the SIA.

[38] As regards the claim based on statutory duty of care, learned counsel for the respondent submitted that the determinant of whether a duty is created or not in the statutory context is whether the legislature has created a situation of statutory

proximity between the named parties. Concerning the SIA, learned counsel for the respondent submitted that the appellant counsel's reliance on s. 50(1) of the SIA to allege statutory proximity is misplaced in law since the only duty of an auditor in the course of performing its duties as statutory auditor, is to report to the SC upon becoming aware of the matters enumerated in s. 50(2) of the SIA. This is a 'whistle blowing' provision (besides s. 53) to enable the SC to decide whether it should appoint an independent auditor or not to carry out an investigative report of the kind and scope in s. 52 of the SIA. This reporting duty in s. 50(1) of the SIA is an incidental duty of an auditor. It is also contingent upon actual awareness, or awareness in fact as opposed to cases of where the auditor 'ought to have been aware'. Learned counsel then submitted that to create statutory proximity based on s. 50(1) of the SIA would effectively render irrelevant the accuracy of the information contained in the reports since the emphasis would then be on whether there was a failure in the reporting duty or not.

[39] In the final analysis, according to learned counsel for the respondent, this appeal ought to be dismissed, in any event, since there is nothing in the phrased questions or the SOC that the respondent was 'aware' of the matters in s. 50(1) of the SIA but failed in its reporting duty to the SC to enable it to take or not to take action. Furthermore, since s. 50(1) of the SIA is nothing more than a 'whistle blowing' provision which are common in statutes providing for, or establishing, a regulatory authority to impute statutory proximity by reason of this provision alone would, then by extension, all auditors carrying out annual statutory audits of companies under the CA stand in a situation of 'statutory proximity' to all and sundry suffering economic loss arising from breach of the reporting duty under s. 174(8) or s. 174(8A) of the CA.

Judgment Of The Court

[40] In our judgment, any examination of the tests to be applied in determining the existence of a common law duty of care in cases of economic loss must commence with the 'useful guides to courts among the Commonwealth when deciding how to approach a novel situation in point of imposing a duty of care' (per Gopal

Sri Ram JCA in *KGV & Associates Sdn Bhd v. The Co-operative Central Bank Ltd* [2006] 4 CLJ 241 representing a summary of the pronouncements by Lord Bingham in *Her Majesty's Commissioners of Customs and Excise v. Barclays Bank* [2007] 1 AC 181:

(a) First, there are cases in which one party can accurately be said to have assumed responsibility for what is said or done to another. In this regard, the finding of an assumption of responsibility may obviate the need for further enquiry. Otherwise, further consideration is needed;

(b) Second, the assumption of responsibility test must be applied objectively, and is not based on what the defendant thought or intended;

(c) Third, the threefold tests in *Caparo* does not itself provide a straightforward answer to 'the vexed question' of whether, in a novel situation, a party owes a duty of care. As Lord Roskill had said in *Caparo* at p. 628, 'there is no simple formula or touchstone' in determining the existence of a duty of care in any given case;

(d) Fourth, the incremental test is of little value in itself, and is only helpful when used in combination with a test or principle that identifies the legally significant features of a situation; and

(e) Fifth, the majority outcome of the leading cases are in almost every instance sensible and just, irrespective of the test applied to achieve the outcome. In this regard, attention is concentrated 'on the detailed circumstances of the particular case and the particular relationship between the parties in the context of their legal and factual situation as a whole'.

[41] We have commenced our judgment with reference to these guidelines because the Federal Court through the judgment of Justice Alauddin Mohd Shariff CJ Malaya (as His Lordship then was) in the case of *The Co-Operative Central Bank Ltd v. KGV Associates Sdn Bhd* (*supra*) accepted the five guidelines as applicable in our jurisdiction when determining the existence of duty of care as is evident from the following passage in the judgment of His Lordship:

> Referring to the five general observations in the speech of Bingham LJ they are just that – observations arising from a review of the established cases (pp. 261-263). They were not intended to create new law. The first two observations deal with

> the 'assumption of responsibility' test – what it means and however, it is to be applied. The third observation is in relation to the three-fold *Caparo* test and however, this relates to a novel situation. Here the observation is imprecise labeling can make it difficult to find if a duty of care exists in a novel situation. The cautionary words in *Caparo* and the trend towards categorization are repeated. The fourth observation is that the incremental approach is helpful when used in combination with established principle. The fifth observation is the same call made in *Ampang Jaya's* case-that the detailed circumstances of the particular case and the particular relationship between the parties generally leads to the correct finding on the existence or not of a duty.
>
> The fifth observation, in our opinion, holds the key to this area of law. The ultimate question is whether the detailed facts and circumstances of the case support the finding of a duty of care. The same observation is found in *Ampang Jaya's* case and it is also found in the decision of the Court of Appeal. Merely setting out the observations as has been done in the *Barclays Bank* case has created no new law. It simply clarifies what the Courts have been consistently saying. (paras. 28 and 29 at p. 557 of the reported judgment of the Court)

[42] The significance of the guidelines pronounced by Lord Bingham and the acceptance of the same by the Federal Court in the case of *The Co-Operative Central Bank Ltd v. KGV Associates Sdn Bhd* (*supra*) is that even before Lord Bingham's pronouncements, it was acknowledged that the prevailing authorities recognised three tests which have been used in deciding whether the defendant sued as causing pure economic loss to a claimant owed him a duty of care in tort. This is evident from the following passage in the judgment of Lord Bingham:

> The parties were agreed that the authorities disclose three test which have been used in deciding whether a defendant sued as causing pure economic loss to a claimant owed him a duty of care in tort. The first is whether the defendant assumed responsibility for what he said and did *vis-à-vis* the claimant, or is to be treated by the law as having done so. The second is commonly known as the threefold test: whether loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the relationship between the parties was one of sufficient proximity,; and whether in all the circumstances it is fair, just and reasonable to impose a duty of care on the defendant towards the claimant (what Kirby J in *Perre v. Apand Pty Ltd* [1999] 198 CLR 180, paragraph 259 succinctly labeled 'policy'). Third is the incremental test, based on the

observation of Brennan J in *Sutherland Shire Council v. Heyman* [1985] 157 CLR 424, 481, approved by Lord Bridge of Harwich in *Caparo Industries plc v. Dickman* [1990] 2 AC 605, 618, that:

> it is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a *prima facie* duty of care restrained only by indefinable 'considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed'. (at page 189).

[43] Lord Bingham expressed dissatisfaction with the incremental test and suggested a preference for a test based 'on the detail circumstances of the particular case and the particular relationship between the parties in the context of the legal and factual situation as a whole (see para. 8 at p. 192 of the reported judgment of the court). We believe that it is this passage in the judgment of Lord Bingham which caused Justice Alauddin Mohd Shariff CJM to observe that:

> The ultimate question is whether the detailed facts and circumstances of the case support the finding of a duty of care.

[44] A careful analysis of the LJC's grounds of decision will reveal that Her Ladyship proceeded to determine the existence of common law duty of care solely on the basis of the threefold test enunciated in the *Caparo*. Based on this premise, Her Ladyship ruled that the appellants failed to satisfy the 'proximity' test, an essential ingredient of the threefold test. With respect, in our judgment, Her Ladyship should have applied the guidelines enunciated by Lord Bingham in *Her Majesty's Commissioners of Customs and Excise v. Barclays Bank* (*supra*) and accepted by our Federal Court when considering the issue of duty of care, particularly the first test.

[45] The first test premised on the 'assumption of responsibility' was considered at length by Lord Browne-Willkinson in *White v Jones* (*supra*) as having being invented in *Hedley Byrne & Co v. Heller* (*supra*) According to His Lordship, the meaning of 'assumption of responsibility' in the law of negligence was:

(a) First, there can be special 'relationship' between the parties which give rise to the law treating the defendant as having assumed a duty to be careful in circumstances where, apart from such relationship, no duty of care would exist.

(b) Second, a fiduciary relationship is one of those relationships: A

(i) Where A assumes to act in relation to the property or affairs of another (B), A, having assumed responsibility for B's affairs is taken to have assume certain duties in relation to the conduct of those affairs, including a duty of care; B

(ii) It is also important to note that this fiduciary relationship giving rise to an assumption of responsibility does not depend on any mutual dealing between A and B, let alone on any relationship akin to contract. While such factors may be present, equity imposes the obligation because A has assumed to act in B's affairs; C

(iii) Thus, a trustee is under a duty of care to his beneficiary whether or not he has had any dealing with him: indeed he may be as yet unborn or unascertained and therefore any direct dealing would be impossible; and D

(iv) What follows from this lack of mutuality in a typical fiduciary relationship is that it is not a necessary feature of all such special relationships that B must in fact rely on A's actions. The important point is that A knows that B is consciously relying on A, and that B's economic well-being is dependent upon A's careful conduct of B's affairs. E

(c) Third, a fiduciary relationship is not the only such relationship, but other relationships may also be held to give arise to the same duty. F

[46] We agree with the submission of the learned counsel for the appellants that effectively this test means that: G

(a) First, reliance on the respondent auditor's report is no longer an essential ingredient to establish duty of care;

(b) Secondly, no *anterior* relationship between the appellants and the respondent is necessary to satisfy ingredients of forseeability and proximity as evidenced by the following passage in the judgment of Brennan CJ: H

> By accepting the testator's retainer, the solicitor enters upon the task of effecting compliance with the formalities necessary to transfer property from a testator on death to an intended beneficiary; it is foreseeable that, if reasonable care is not exercised in performing the task, the intended beneficiary will not I

take the property; the solicitor fails to exercise reasonable care whereby the formalities are not complied with; and the intended beneficiary thereby loses the property. (see *Hill v. Van Erp* (*supra*) at 694)

(c) thirdly, the ingredient relating to proximity is satisfied so long as the assumption of responsibility may be inferred by reason of the existence of a special relationship as evidenced by Lord Bingham's pronouncements that:

the finding of an assumption of responsibility may obviate the need for further inquiry.

[47] In our judgment, if the LJC had applied Lord Bingham's first test, Her Ladyship would have realised that SJAM for all intent and purposes were trustees of the funds and investments placed with them by the appellants. We opine to this effect as:

(a) SJAM as a licensed fund manager undertook to preserve and enhance the funds and investments of the appellants;

(b) The appellants' monies were placed with SJAM by way of specific investments;

(c) SJAM was required by statute to place these funds and investments with custodians to ensure and enforce segregation of the funds and investments separately from the general assets of SJAM;

(d) These funds and investments, though legally in the name of SJAM, are owned beneficially by the appellants; and

(e) These funds and investments consequently do not form part of the estate of SJAM.

[48] Her Ladyship would also have realised that following the placing of the appellants' funds and investments with SJAM, the appellants were vulnerable since:

(a) Their funds and investments were entirely in the control of SJAM during the subsistence of the contractual arrangement; and

(b) The appellants lacked any capacity whether individually or collectively to take steps to actively monitor the use of their funds by SJAM.

[49] In our judgment, in the circumstances set out in paras. 47 and 48, the respondent would know or ought to know that:

(a) the appellants were vulnerable because they were unable to protect themselves from the consequences of the respondent's want of care (see *Woolcock v. CDG* (*supra*) per Gleeson CJ at p. 529);

(b) the respondent's want of and failure to exercise care would be inherently likely to cause that type of economic loss since:

(i) The respondent had the relevant means and access to all of SJAM's books records and accounts, to protect the appellants' investments;

(ii) The respondent also knew, or ought to have known that the appellants would be relying on the reports given by SJAM and the audit reports to ensure that their investments remained safe and protected;

(iii) The respondent's failure to produce accurate and comprehensive reports would thus potentially put the appellants' investments in jeopardy.

[50] We are fortified in coming to the conclusion that the respondent as auditors should have foreseen economic loss to the appellants in these circumstances by the decision of the High Court of Australia in relatively similar circumstances and involving an auditor and investors with the intermediary being a company in which the investors had invested funds. In this case, the company sought a contribution from the auditors on the grounds that:

(a) KPMG as the auditors owed a duty of care to a confined class of persons, namely, the investors in the company. The applicant claimant was one such member of that class;

(b) The auditors in the conduct of its audit of the company breached that duty of care;

(c) If the auditors had not breached its duty of care, its audit report would have been qualified and the irregularities in the account would have been reported to the Australian Securities and Investments Commission (ASIA;) and the company's directors;

(d) This would have caused the company to cease trading, which would have reduced the damages suffered by the applicant;

(e) The company had a custodial role in relation to the investments;

(f) The investors, such as the applicant, were therefore in a position of vulnerability because they had no means of checking or ensuring the safety of their investments held by the company; and

(g) The auditors were in a position of control, having the ability and power to detect and report any irregularities that would put the investments at risk. (see para. 83 of submission of the appellant)

[51] The High Court of Australia when ruling that the company had an arguable case that the auditors owed the company a duty of care opined that:

(a) in the present case, the vulnerability of the applicant arose subsequent to the making of the investment by reason of (a) the loss of control over its funds, and (b) the lack of capacity to take any steps to monitor the use of such funds;

(b) there was a basis for concluding that the auditors either know or ought to have known of these facts, and that they may have had the relevant means of taking steps to protect this confined class of investors; (see pages 567 to 568 of the reported judgment of the Court in *Dartberg Pty Ltd v. Wealthcare Financing Planning* 224 ALR 552).

[52] In our judgment, the LJC in acknowledging that the appellants satisfied the ingredient of forseeability but not proximity, with respect, failed:

(a) To appreciate the distinction between a shareholder in a company (as was the case in *Caparo*) and the appellants. A shareholder is one who buys shares in an enterprise and becomes a shareholder in that corporate enterprise. This person, *qua* shareholder, becomes part of that corporate enterprise (which no doubt remains legally a separate juridical entity). The investor *cum* shareholder therefore assumes the enterprise risk. The appellants clearly fell into an entirely

different category in that as investors, they could not be identified with the corporate enterprise ie, SJAM nor its shareholders;

(b) secondly, unlike a shareholder who invests in an enterprise, the appellants placed funds on trust with SJAM as a licensed fund manager. The funds are placed under and by way of specific investments. By statute the fund manager is required to place the funds and investments with a custodian to ensure and enforce segregation of the funds or investments distinct from the general assets of SJAM. These funds and investment though legally in the name of SJAM are owned beneficially by the appellants;

(c) thirdly, the LJC by treating the appellants as no different from the shareholder in *Caparo* failed, with respect, in our opinion, to pay sufficient regard to the purpose of the audit reports made under the SIA:

(i) First, Her Ladyship said that the true purpose of the SIA audit was not for the protection of the appellants and other investors;

(ii) Secondly, Her Ladyship held that the SIA audits were mere 'compliance' audits and not 'investigative' audits; and

(iii) Thirdly, Her Ladyship found that the duties owed by fund managers under the SIA framework were to be enforced by the SC and not third parties such as the appellants and other investors.

[53] With respect, we are unable to agree with any of the three findings of the LJC. We agree with the submission of learned counsel for the appellant that Parliament could not have intended that the CA audit and the SIA audit would be for the same purpose and would cover the same ground. This would simply be a redundant exercise and serve no purpose at all, unless there was intended to be a difference in the scope and approach of the SIA audit as compared to the CA audit. This would be all the more so where the same auditor conducts the CA audit under the CA and separately conducts the SIA audit under the SIA. This was the case with the respondent in relation to SJAM. In our judgment, a careful perusal of the provisions of ss. 47C, 47D, 48,

A 49 and 50 of the SIA will collectively reveal the true statutory intendment and purpose of the SIA audit. An analysis of these provisions in ss. 47C, 47D, 48, 49 and 50 will confirm that the scope of the audit is broader than the ruling of the High Court.

B **[54]** Secondly, it is part of the duty of the respondent under s. 50 of the SIA to immediately make a report to the SC if it becomes aware:

(a) of any matter which in its opinion may constitute a breach of any provision of the securities laws;

C

(b) of any irregularity that may have a material effect upon the fund manager's account, including any irregularity that may jeopardise its clients' assets;

D (c) that losses have been incurred by the fund manager, which renders it unable to meet the minimum statutory financial requirements; and

(d) that the auditor is unable to confirm that the claims of the fund manager's clients are covered by the fund manager's

E assets.

[55] In other words, upon discovering any non-compliance or irregularity on the part of SJAM, the respondent would be under a duty to report the same to the SC. In our opinion, it is evident

F from the aforesaid statutory provisions that the focus of the SIA audit includes the safeguarding of the assets of the appellants held by SJAM. The report by the respondent would serve to alert the SC and/or the relevant government authority to take such further action as is required based on the circumstances. In this respect,

G in our judgment, contrary to the findings of the LJC, the SIA audit framework is a critical means of (a) ensuring compliance, as well as (b) detecting any non-compliance by SJAM in relation to the management of the appellants' assets.

H **[56]** Furthermore, in our judgment, the LJC also failed to appreciate the significance of form 9. Paragraph I of form 9 states:

> After making due inquiry, I am/we are of the opinion that the records and property arising from transactions conducted by the fund manager during the year for clients and the fund manager's

I own account were properly segregated in accordance with the requirements of the SIA.

[57] In our judgment, the significance of this paragraph is that a distinction is made between SJAM's own account and the clients' accounts and the transactions under the former are distinct from the latter. Pursuant to the provisions of form 9, the respondent is required under the SIA audit to examine the accounts of the clients of SJAM, which in this case, would refer to the accounts and transactions undertaken by SJAM on behalf of the appellants. The word 'transaction', in turn, includes both the depositing of and withdrawal of funds. In other words, the respondent is required by statute to monitor the inflow and outflow of funds from the accounts of SJAM as well, as its clients' accounts to ensure the proper segregation of the accounts following the transactions. In the face of these requirements, we are unable to agree with the finding of the LJC that the SIA audits were mere 'compliance audits and not investigative audit'. If in the course of the audit, the auditor comes across a transaction or an accounting entry that does not comply with the provisions of division 3 of part VII of the SIA, the auditor has a duty to look deeper. The auditor cannot ignore the irregularity or breach. We agree with the submission of learned counsel for the appellant that this does not amount to saying that the audit is from the very beginning investigative in nature. For instance, the auditor has to confirm that there are no withdrawals of the clients' monies and property otherwise than for their intended purpose pursuant to the SIA, a task, in our opinion, which would be difficult to comply unless the respondent undertook an investigative approach to the accounts of SJAM.

[58] Finally, there is the finding of LCJ that any breach of the SIA provisions can only be enforced by the SC. With respect, this finding disregards the fact that the enforcement provisions are directed at SJAM and not the respondent. As correctly pointed out by the counsel for the appellants, the SIA does not provide a remedy for an auditor's breach of its duties under division 3, part VII. With respect, Her Ladyship also failed to appreciate that the legislative framework contained in the SIA can, in an appropriate case and, in our opinion, this is one such case, be a basis to found the claim for breach of the common law duty of care arising from the careless performance of a statutory duty. (see para. 36 of this judgment)

A **Conclusion**

[59] In our judgment, by applying the threefold tests pronounced in the *Caparo* to the total exclusion of the other two tests which were ruled to be equally applicable in this country by the Federal B Court in *Co-operative Central Bank v. KGV* (*supra*), the LJC applied the wrong test to the novel situation prevailing on the particular facts of this case. The facts in this case being novel, in our opinion, because of the unusual situation in which the appellants found themselves to be in, whereby their funds and investments C were in the hands of a trustee fund manager (SJAM) but over which funds they had no control. In our judgment, the respondent's agreement to conduct the SIA audit for SJAM with knowledge or imputed knowledge of the unusual situation in which the appellants were placed, gave rise to a duty on the part of the D respondent to undertake a proper audit in the course of carrying out its statutory duty and this obligation created such a relationship between it and the appellants so as to give rise to a common law duty of care.

E **[60]** In our opinion, whether one applies the 'assumption of responsibility' test or 'whether the detailed facts and circumstances of the case support the finding of the duty of care' (per Alauddin FCJ), what is likely to be decisive and always relevant, in determining whether a duty of care is owed is the answer to the F question 'How vulnerable were the appellants to incurring loss by reason of the respondent's conduct'? (similar to the question posed by McHugh J in *Perre v. Apand Pty Ltd* (*supra*)). In our judgment, having regard to the legislative framework contained in the SIA and the position in which the appellants were placed, the G answer to this question must be that the respondent owed a common law duty of care to the appellants. In our opinion, the submission by learned counsel for the respondent that the annual reports cannot be the platform for investments made by the appellants is justified. However, with respect, in our opinion, the H relevance of the reports is not the initial decision by the appellants to invest in SJAM but the continued retention of their funds and investments in SJAM. In our opinion, the duty of care arose in this manner. If the respondent had not breached their duty of care, the audit reports would have been qualified and the I irregularity in the accounts of SJAM would have been reported to the SC. Such a report to the SC, in turn, would have caused the SC to take the appropriate action thereby causing SJAM to cease

trading and consequently diminish the losses of the appellants. This is precisely what happened on the facts of this case. However, because the audit reports that were produced by the respondent were 'clean', the SC took action much later and the ensuing winding up of SJAM was correspondingly delayed thereby causing substantially more losses to the appellants. What is significant about the aforesaid facts, in the context of the 'assumption of responsibility test' and the related ingredients of 'control and vulnerability' is that during the whole of this period the respondent was in a position of control, having the ability and power to detect and report any irregularities that would put the investments at risk. In this respect, the finding of the LJC that the audit report was not prepared for the benefit of the investors has been consistently rejected by the courts of Australia. Finally, we are conscious that in *Esanda Finance Corporation v. Peat Marwick Hungerfords* [1997] 188 CLR 241, the court refused to recognise the existence of duty of care where the investor was a sophisticated investor. However, in our opinion, this does not affect the claim of the appellant in Civil Appeal No: 1750-08-2013 ie, CIMB because CIMB are, in effect pursuing the claim of their investors who had invested in SJAM.

[61] Accordingly, our answers to the two questions are that the respondent owed a common law duty of care to the appellants. In the light of our decision of the existence of common law duty of care, we have not considered the claim based on statutory breach. We therefore set aside the orders of the learned judge of the High Court and remit the two matters to the High Court for the trial of the issue of the liability of the respondent, if any, to the appellants. Costs to be in the cause and the deposit in both appeals to be refunded to the respective appellants.